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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. LOGAN VINCENT FORD, Defendant and Appellant.	C085985 (Super. Ct. No. 15F04758)

Defendant Logan Vincent Ford, a physician, sexually assaulted a patient during an examination. A jury found him guilty in September 2017 of rape (Pen. Code, § 261, subd. (a)(2); count one), sexual penetration by force or fear (Pen. Code, § 289, subd. (a)(1); count two), and two counts of sexual exploitation by a physician (Bus. & Prof. Code, § 729, subd. (a); counts three and four).

On appeal, defendant contends the trial court erred in admitting evidence of an uncharged sexual offense with a second victim named C. He also challenges his conviction on count four, arguing the record does not reflect that the jury reached a guilty verdict on the count. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. The charged sexual assault

In March 2015, the victim was in her early 50's. She suffered from multiple chronic conditions, including chronic pain, diverticulitis, and "extreme" depression. She had grown dissatisfied with the various medications she had tried for her ailments and decided to try medical cannabis.

The victim was accompanied by her neighbor to a clinic in Sacramento called 420MD. When they arrived at approximately 3:00 p.m., the victim completed a form detailing her medical and mental health history and gave it to the receptionist. The victim was then called into a private exam room, where defendant was sitting alone at a desk.

Defendant closed the door completely behind the victim, and the two began discussing her medical history, including her mental health. Defendant asked if she was HIV positive, and she responded, "no." Defendant also asked if she was sexually active, and she said she had not been in the eight months prior to the appointment. The victim explained she was in "a lot of pain" from diverticulitis, and defendant offered to examine her. The victim complied with defendant's request to lie down on the exam table and undo her belt and pants. Defendant began to examine her lower abdomen and then put his hands below her underwear line toward her pelvis. He suddenly put his left hand on her mouth, licked his right fingers, and digitally penetrated her vagina.

Shocked, the victim froze in fear. Defendant pulled her off the table and turned her so she was facing away from him. Covering her mouth with his fingers, he proceeded to rape her. Defendant said in her ear that he could not "have [her] going without any

fun," in an apparent reference to her sexual inactivity. The victim suffered vaginal bruising and tearing and a mark on her inner gum.

When defendant let the victim go, she turned around and grabbed him by the penis. He pushed her forward and she hit the wall. Defendant told the victim to be quiet and walk out with a smile "like nothing ever happened." The victim left the room and paid the receptionist. Without telling anyone about the rape, she sat in the waiting area until her neighbor emerged from his appointment with defendant. When the neighbor came out, the victim was too embarrassed to tell him what happened. She wanted to go home, but her neighbor wanted to go to a restaurant to get something to eat.

The victim finally arrived home around 6:00 p.m. She cried and then took her underwear off and put it in a plastic bag to preserve evidence. The victim told her brother and her daughter about the rape, and she followed their advice to call the police.

Testing revealed there was semen inside the victim that matched the DNA sample provided by defendant. At the time of trial, the victim had a pending civil lawsuit against defendant and 420MD, although she was unsure how much she was seeking in damages.

At trial, defendant challenged the victim's credibility and argued their sexual encounter was consensual. The jury heard a recording of defendant denying the assault during a jail visit with his mother.

2. Uncharged offense involving C.

During trial, evidence was presented regarding a May 2015 uncharged offense of sexual battery against C., a woman in her mid-40's. The jury heard testimony from C., her work manager, and a police investigator regarding the incident. A recording of a pretext call between defendant and C. also was played for the jury.

C. testified that she sought a prescription for medical cannabis in May 2015 at the 420MD clinic in Berkeley to treat her insomnia, bipolar disorder, depression, anxiety, and posttraumatic stress disorder. She also needed a card for her job in the medical marijuana industry. C. testified she was feeling "blue" and depressed the day she went to 420MD.

Like the victim, C. completed forms detailing her medical history and then entered the consultation room. The door was closed completely behind her, and she and defendant began discussing her medical history. C. became emotional and defendant gave her a hug. Defendant then positioned himself behind her and began massaging her shoulders. Defendant moved his bare hands under her clothing and down onto her breasts. C. tensed up, jerked back, and asked defendant if he also was a massage therapist. Defendant removed his hands, completed the consultation, and gave her a medical cannabis physician recommendation. Defendant hugged C. and asked, "Is there anything else I can do for you?" Fearing defendant was propositioning her, C. exited the room.

C. paid her bill and left the clinic. C. testified she felt "very uncomfortable" because defendant had taken advantage of his position as a physician, and she began to cry. C. called her manager, who took her to the local police station so she could report the incident.

During a June 2015 pretext phone call, C. asked defendant about the incident. During the call, C. told defendant his behavior had made her feel worse, and defendant apologized but denied touching her breasts. Defendant asked, "[W]hat can I do to make this right with you?" and, "Is an apology enough?" but C. was unsure. During the pretext call, C. described herself as being suicidal during the appointment, but at trial C. testified that she did not recall feeling that way or telling defendant that she was experiencing suicidal thoughts.

After the incident, C. resigned from her position. She also sued defendant and 420MD's owners civilly and received $10,000 in damages. At the time of trial, she was living in Illinois.

3. Pretrial rulings regarding admission of evidence of uncharged offense involving C. and related jury instructions

Before trial, the court found the evidence regarding the uncharged offense involving C. admissible under Evidence Code sections 1101, subdivision (b), and 1108.[1] Although the charged offense was rape and the incident involving C. was sexual battery, each involved the same class of conduct. In addition, each took place in a cannabis clinic during a medical examination. The trial court ruled that the incident involving C. was not unduly prejudicial under section 352 because it involved a lesser crime. During trial, defendant renewed his objection to the evidence regarding the incident with C., but the court affirmed its prior admissibility ruling.

With respect to the evidence regarding the incident involving C., the jury was instructed pursuant to CALCRIM No. 1191 as follows: "The People presented evidence that the defendant committed the crime of sexual battery that was not charged in this case. . . . [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged offense. . . . [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the uncharged offense, you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude the defendant was likely to commit [the charged offenses]. If you conclude the defendant committed the uncharged offense, that conclusion is only one fact to consider, along with all the other evidence. It is not sufficient, by itself, to prove that the defendant is guilty of

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[1] Undesignated statutory references are to the Evidence Code.

[the charged crimes]. The People must still prove each charge beyond a reasonable doubt. [¶] Do not consider this evidence for any other purpose."[2]

4. The jury verdict and sentence

When the jury completed deliberations and returned to the courtroom, the jury foreperson confirmed the jury had reached a verdict. At the court's request, the clerk read the jury's guilty verdict on each of the four counts and noted each was signed by the foreperson. The court asked the jury if the decisions represented their "true and correct verdicts," and the jurors collectively answered in the affirmative. Defense counsel did not respond to the court's offer to have the jury polled.

The copies of the written jury verdict forms are marked "guilty" on counts one through three, but neither "guilty" nor "not guilty" is marked on the form for count four (Bus. & Prof. Code, § 729, subd. (a)). Similarly, the minute order does not reflect a verdict for count four. In November 2017, the trial court issued an order correcting the minute order and verdict form to reflect that the jury had checked the "guilty" box for count four.

In November 2017, defendant was sentenced to state prison for an aggregate term of 12 years, consisting of six years each for counts one and two, including one year each for counts three and four, stayed pursuant to Penal Code section 654.

DISCUSSION

I

Defendant contends the trial court abused its discretion by admitting evidence of the uncharged offense involving C. because it was more prejudicial than probative. According to defendant, the evidence of the offense involving C. was "quite inflammatory" given the "apparent impact" it had on C. Defendant points to C. resigning

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[2] The jury also was instructed pursuant to CALCRIM No. 375 (evidence of uncharged offense to prove common plan).

from her job and moving to Illinois after the incident as evidence that C. was "traumatized" by the incident. In addition, C. commented during the pretext phone call that she had been suicidal the day of the incident and felt worse because of what happened.

Defendant also argues that the evidence had little probative value because the two incidents involved different kinds of sexual behavior, namely, rape versus a brief touching of the breasts. Defendant further contends that, because the incident involving C. occurred after the charged offenses, it does not show that defendant was acting according to a common scheme or plan at the time of the incident involving the victim.

Since the trial court admitted the evidence under both section 1108 and section 1101, we consider section 1108, the broader statute, first. Concluding that the evidence was properly admitted under section 1108, we need not consider its admissibility under section 1101.

With certain exceptions, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (§ 1101, subd. (a).) One such exception is found in section 1108, subdivision (a), which provides that evidence of prior uncharged sexual offenses is admissible to prove defendant's propensity to commit such offenses, without restriction other than that of section 352. (*People v. Falsetta* (1999) 21 Cal.4th 903, 915-920.)

Uncharged sexual offense conduct is admissible under section 352 if its probative value is not "substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Although a section 352 analysis depends on the " 'unique facts and issues of each case' " (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116-1117), courts should consider whether: (1) the

uncharged conduct is similar to the charged offense, (2) the evidence of the uncharged conduct is stronger and more inflammatory than the charged offense, (3) the uncharged conduct occurred so far in the past that it is remote or stale, (4) the jury is likely to be confused or tempted to punish a defendant for the uncharged conduct, and (5) admission of the uncharged conduct evidence will require an undue consumption of time. (*Id*. at p. 1117.)

Because the decision whether to admit evidence under sections 1108 and 352 is entrusted to the trial court's sound discretion, we will not disturb its ruling on appeal unless that ruling was arbitrary, capricious, or patently absurd. (*People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1079-1098; see also *People v. Frazier* (2001) 89 Cal.App.4th 30, 42.) Defendant fails to make that showing.

Despite defendant's contentions, the offense involving C. was highly relevant given its similarity to the charged offenses with the victim. Each involved sexual offenses as defined in section 1108, subdivision (d), namely, sexual battery (Pen. Code, § 243.4) and rape (Pen. Code, § 261). (See *People v. Loy* (2011) 52 Cal.4th 46, 63 [so long as the charged and uncharged offenses are sex offenses as defined in section 1108, they need not be identical].) The offenses were also committed under similar circumstances: defendant engaging in an unwanted sexual act with a patient with known mental health issues during a private consultation in a closed room for a medical cannabis evaluation.

The conduct involving C. was nowhere near as reprehensible as the conduct defendant engaged in with the victim. Even though C. quit her job and complained of worsened mental health issues soon after the assault, there is little risk that the jury would be so outraged that they would be tempted to convict defendant, despite disbelieving the victim, especially since C. testified she had received $10,000 from defendant in a civil suit over the matter. Introducing the evidence regarding the conduct involving C. did not

unduly consume time, and, although the offense involving C. occurred after the charged offenses, they were close in time—only two months apart.

Moreover, the jury was unlikely to be misled or confused, especially since it was properly instructed to consider the evidence only if the prosecution had proved by a preponderance of the evidence that defendant committed the uncharged act. If the jury concluded that the defendant committed the uncharged offense, it could, but was not required, to conclude that he was "disposed or inclined to commit sexual offenses," and also "likely to commit [the charged offenses]." This was "only one fact to consider" and "not sufficient, by itself, to prove that the defendant is guilty of [the charged crimes]," which the prosecution still had to prove "beyond a reasonable doubt." The instructions further made clear that the jury could not consider the evidence "for any other purpose." In sum, we find no abuse of discretion in the admission of the evidence regarding the offense involving C.

II

Despite the oral pronouncement of the jury's verdict, defendant contends the record does not support the conclusion that the jury found defendant guilty of count four. We find no error, given that the jurors collectively answered in the affirmative that this was their true and correct verdict and defendant failed to respond affirmatively when the court offered to poll the jury individually. Moreover, the trial court's November 2017 order corrected the minute order and verdict form to reflect the jury's guilty verdict on count four.

DISPOSITION

The judgment is affirmed.

KRAUSE, J.

We concur:

RAYE, P. J.

BLEASE, J.